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No. 04-634

DEC 2 0 2004

IN THE

Supreme Court of the United States

PEABODY COAL COMPANY,
PEABODY WESTERN COAL COMPANY, AND
PEABODY HOLDING COMPANY, INC.,
Petitioners,

v.

THE NAVAJO NATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari ("Petition") demonstrated that this Court should grant review to establish that federal question subject-matter jurisdiction arises pursuant to 28 U.S.C. § 1331 over an action to enforce a federally approved amendment to a mineral lease between a federally recognized Indian tribe and a private corporation. Both the lease and amendment in this case were approved by the Secretary of the Interior under the Indian Mineral Leasing Act of 1938 ("IMLA"), 52 Stat. 347, 25 U.S.C. § 396a. The tribe has disputed the validity of the lease amendment on grounds already rejected by this Court in *United States v. Navajo Nation*, 537 U.S. 488 (2003).

Predictably, the Brief in Opposition ("BIO") filed by the Navajo Nation disputes whether the question presented is properly raised by the facts and pleadings of this case. But this strategy for evading certiorari is misplaced here. The BIO acknowledges that federal question jurisdiction arises where a "complaint raise[s] issues regarding . . .the validity of federally regulated contracts." BIO 12. The principle has been adopted by courts in the Fifth, Eighth, and Tenth Circuits, as even the BIO admits. BIO 12-13. That well recognized principle governs this case and demonstrates that the Ninth Circuit's contrary ruling warrants review by this Court.

1. The BIO's central premise is that Peabody's complaint in the District of Arizona "does not raise any issue regarding the validity of its lease with the Navajo Nation." BIO 6. That argument is flatly wrong. No amount of sophistry can obscure the fact that Peabody's Arizona complaint sought judicial enforcement of federally approved royalty rates on the ground that the Navajo Nation was engaged in an effort to have those rates invalidated. Peabody's Arizona complaint contained an extensive discussion of the Navajo Nation's efforts to attack the validity of the lease and its amendments, including the Navajo Nation's own D.C. lawsuit against Peabody. Peabody's Arizona

complaint explained that, since 1999, the Navajo Nation had been "pursuing litigation in the District of Columbia to adjudicate anew the appropriate royalty rate." ER 23 ¶ 58. Peabody's Arizona complaint stated that "[t]he Navajo Nation lawsuit nonetheless seeks a declaration of he parties' rights under Leases 8580 and 9910, including the following:

a. That Peabody's right to mine coal, and the Navajo Nation's obligation to perform, under the Lease terminated in 1984 with the 'failure of the condition that a reasonable adjustment be made in the royalty rate';

b. That the 1987 Lease Amendments are voidable by the Navajo Nation;

c. That the Navajo Nation has the right to eject Peabody; and

d. That the Navajo Nation has the right to reform both Leases 'to incorporate the reasonable royalty rate adjustment established by the [Bureau of Indian Affairs] Area Director in 1984.'"

ER 26-27, ¶ 63.

The Navajo Nation's D.C. complaint was attached as Exhibit 3 to Peabody's Arizona complaint. The D.C. complaint is included in the record of this case at ER 81-163. The Navajo Nation's D.C. complaint seeks a declaratory judgment that the 1987 Lease Amendments are "voidable by the Navajo Nation" (ER 159) and should be "terminated." ER158. The Navajo Nation's complaint requests a ruling that it is entitled to "eject" Peabody from its land. ER159. Alternatively, the Navajo Nation seeks to "reform" the coal leases to impose a 20% royalty rate and to rescind the arbitration procedure the parties used in 1998 to achieve the award here. *Id.*

Hence, it is plainly incorrect for the BIO to assert that Peabody's Arizona complaint did not raise any issue regarding

the validity of the leases. BIO 6. To the contrary, the Arizona complaint explained in great detail that the Navajo Nation was seeking to attack the validity of the federally approved leases, their amendments, and the royalty rates they contained. If there were any doubt, the BIO's argument would be foreclosed by the notice pleading principles recognized in *Conley v. Gibson*, 355 U.S. 41 (1957). "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47 (footnote omitted). The validity of the lease and royalty rates were issues that were clearly encompassed within Peabody's Arizona complaint.

2. The BIO asserts that the fact that the Navajo Nation "has questioned the validity of the 1987 lease amendments in *other* cases is no basis for subject matter jurisdiction over *Peabody's* complaint in *this* case." BIO 7 (emphasis in original). The BIO argues that the issue is the well-pleaded complaint rule and the Navajo Nation's possible assertion of the invalidity of the 1987 Lease Amendments as a defense to Peabody's action. BIO 8. That is not the issue. The relevance of the Navajo Nation's D.C. action is that it demonstrates the existence of a justiciable controversy in which the Navajo Nation has disputed the validity of the federally approved royalty rates and amended coal leases. The Fifth, Eighth, and Tenth Circuits have uniformly held that such a dispute over the validity of a federally approved lease or contract creates federal question jurisdiction in light of the comprehensive federal regulatory scheme. For example, in *Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567 (5th Cir. 2001), the Fifth Circuit held that there was federal question jurisdiction over a dispute precipitated by a tribe's attempt to have mineral leases declared void by suits in federal and tribal courts. Similarly, in *Tenneco Oil Co., v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 574-75 (10th

Cir. 1984), the court of appeals found federal jurisdiction over a federal suit for declaratory and injunctive relief after an Indian tribe petitioned for cancellation of an oil and gas lease. *See also Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421 (8th Cir. 1996) (finding federal jurisdiction over casino dispute in which a management company went to federal court for an order to compel arbitration after a tribe had filed a declaratory action challenging validity of contract). By the same token, the allegations in Peabody's complaint that Navajo Nation was attempting to invalidate the 1987 Lease Amendments in the D.C. action should have been enough to trigger federal question jurisdiction in the instant case.

3. The BIO argues that, because Peabody's Arizona action was styled as a suit to enforce the 1998 Final Arbitration Award, it did not trigger federal jurisdiction. The BIO contends that "nothing" in the 1998 Arbitration Award "required approval of the Secretary or an other federal official." BIO 2. "Although [the 1998] lease amendment ultimately was approved by the Secretary [ER74-76], the settlement agreement stated that the arbitration award would remain intact even had the Secretary not approved the amendment." BIO 2-3. Again, the Navajo Nation is wrong.

Peabody's complaint expressly requested that the Arizona federal court "should enforce the final arbitration award of September 16, 1998." ER 30. That award provides, in its entirety:

> Based on the stipulation of the parties, the Arbitration Panel hereby enters the following Award in this matter. From and after the date of this Award:
>
> 1. The royalty rate in Article IV of Coal Mining Lease No. 14-20-0603-8580, as amended, is 12.5% and the royalty/tax cap in Article XXXV is 20.5%;
>
> 2. The royalty rate in Article III of Coal Mining Lease

> No. 14-20-0603-9910, as amended, is 6.25% and the royalty/tax cap in Article XXXII is 14.25%.

ER 72.

In short, the Final Arbitration Award confirmed and set royalty rates. These rates – like all royalty rates under IMLA – plainly *were* dependent on Secretarial approval. Federal law requires as much. 25 U.S.C. § 396a. The Lease Amendment Agreement stated that "[t]his Agreement shall become effective on the date such approval is executed by the Secretary, without delegation. Upon such approval by the Secretary, this Agreement shall constitute an amendment to Lease No. 8580 and to Lease No. 9910." ER 74. The Navajo Nation submitted that the 1998 Lease Amendment Agreement to the Interior Secretary for approval, and it was approved by him on March 29, 1999. ER 76.

The other documents that were part of the same 1998 package manifest the same understanding – that Secretarial approval was a prerequisite for the royalty rates to become effective. The Lease Amendment Agreement was attached as Exhibit B to the 1998 Arbitration Settlement Agreement. ER 69. The Arbitration Settlement Agreement provided that "the parties have agreed to a settlement premised on the final and irrevocable resolution of the arbitration proceedings and *the submission of the Lease Amendment Agreement . . . to the Secretary of the Interior for approval*." ER 69 (emphasis added). The Arbitration Settlement Agreement further specified that Peabody "and the Navajo Nation agree that they shall execute and diligently and in good faith urge, support and encourage the Secretary to approve the Lease Amendment Agreement as expeditiously as reasonably possible [and] *[i]f the Secretary fails to approve the Lease Amendment Agreement, then [Peabody] shall have no obligation to make any of the payments set forth therein*" – i.e., in the Lease Amendment Agreement. ER70(¶ 6) (emphasis added).

To be sure, the Arbitration Settlement Agreement provided

that "[t]he entry of the final arbitration award shall not be contingent or otherwise dependent upon the approval of the Navajo Nation Council or the Secretary of the Lease Amendment Agreement." ER 69-70. But the effect of that language was limited to certain payments under the Arbitration Settlement Agreement – and did *not* extend to the royalty rate provision in the 1998 Lease Amendments, which plainly *was* contingent on Secretarial approval. The Arbitration Settlement Agreement provided that, within ten days of entry of the arbitration award, Peabody would pay the Navajo Nation two million-dollar bonuses required under both the North and South Leases pursuant to the 1987 Lease Amendments. ER 70. It was *this* obligation that was triggered by the entry of the final arbitration award and that was not contingent on approval by the Secretary of the 1998 Lease Amendments. *Id.* But these bonus payments are collateral issues having nothing to do with Peabody's Arizona action, which was aimed at enforcing federally approved royalty rates.

4. The BIO makes further attempts to confuse the issue. For example, the BIO argues that Peabody's Arizona action "does *not* seek" a declaratory judgment that the 1998 Agreements are valid. BIO 3 (emphasis in original). To the contrary, the complaint expressly seeks to enforce the Final Arbitration Award, which (as previously noted), confirmed and set royalty rates of 12.5% for Lease No. 8580 and 6.25% for Lease No. 9910, subject to approval by the Secretary. ER 72. The Prayer for Relief in Peabody's Arizona complaint stated: "plaintiffs respectfully request that this Court order enforcement of the Final Arbitration Award of September 16, 1998. In the alternative, plaintiffs petition this Court for an order compelling the Navajo Nation to arbitrate any issue relating to the royalty rates applicable to Lease Nos. 8580 and 9910." ER 32. Thus, the Arizona action was a suit to enforce federally approved royalty rates.

Next, the BIO argues at length that, when the parties invoked

the arbitration procedures in 1998, they "did not seek to 'repudiate' any provision of the applicable mineral leases or lease amendments." BIO 2. That argument is misleading and mischaracterizes Peabody's position. Peabody's Arizona complaint does not allege that the Navajo Nation repudiated the coal leases by invoking arbitration in 1998.[1] Rather, the complaint alleges that the Navajo Nation sought to repudiate the leases by subsequently filing suit in court to invalidate the leases based upon alleged violations of federal law.

Further, the BIO argues that this Court's decision in *United States v. Navajo Nation*, 537 U.S. 488 (2003), is "irrelevant" to this case. BIO 6 (heading). That is untrue. To be sure, the parties in the two cases are different. But the Navajo Nation does not deny that the grounds on which it seeks to repudiate the coal leases in its D.C. action are *the very grounds rejected by this Court* in its *Navajo Nation* decision. Federal jurisdiction surely must lie in a case where a tribe seeks to repudiate a lease on grounds already rejected by this Court.

5. In the end, the Navajo Nation seeks to distract this Court from the important legal principle at stake by obscuring the facts of this case. This Court should not miss the forest for the trees. This case involves one of the largest economic development projects on an Indian reservation in the United States. The Peabody coal leases and the connected power plants (the Mohave Generating Station and the Navajo Generating Station) are precisely the kind of private economic development that Congress meant to foster on tribal lands. When the coal supply agreement was reached in 1965, the Secretary of the Interior issued a press release announcing the "[t]he largest coal supply

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[1] To the contrary: the coal leases, as amended in 1987, provided that arbitration was the sole means of adjusting the royalty rates. ER 16-17. Accordingly, Peabody's complaint recognizes that "the Navajo Nation sought arbitration in 1998 pursuant to the 1987 Lease Amendments." ER 17 (heading).

letter of intent agreement ever negotiated." The Secretary explained that the agreement would mean "new jobs, large tax benefits, and tremendous economic advantages not only in royalties and jobs for the two Indian tribes, but also for all of the entire southwest." The Secretary praised "all parties involved in this agreement . . . for taking a giant step forward in development of a formula for joint public and private resource development in the Colorado Basin that will become a model for the Nation."

For its part, the Navajo Tribe told the federal government that "[t]he continued economic and social progress of the Navajo Tribe depends, to a great extent, upon the development and sale of their huge coal deposits."[2] The Navajo Nation opposed the establishment of competing energy projects as "interfering and being inconsistent with the purposes for which the Navajo Indian Reservation was created."[3]

The Ninth Circuit's decision will disrupt the congressional scheme by interfering with the ability of private parties to avail themselves of federal court jurisdiction to establish the validity of their leases, contracts, and arbitration agreements with Indian tribes. If there is no federal jurisdiction in this case – which involves significant economic investments subject to federal regulation and Secretarial approval – then it is hard to see when there would ever be such jurisdiction.

The Ninth Circuit's decision denying a federal forum for the enforcement of the federally approved coal leases will work substantial hardship on the very Indian tribes Congress has endeavored to protect. Here, for example, the Navajo Nation's persistent efforts to invalidate the 1987 and 1998 Lease

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[2] Colorado River Basin Project: Hearing on H.R. 3300 and S. 20 before the House Committee on Interior and Insular Affairs, Subcommittee on Irrigation and Reclamation, 90th Cong. 90-5 (1967) (statement submitted by the Navajo Tribe of Indians to Federal Power Commission, Feb. 21, 1967).

[3] *Id.*

Amendments have already created sufficient uncertainty concerning the coal supply for the Mohave Generating Station to jeopardize its continued operation. The Operating Agent and majority owner of the Mohave facility, Southern California Edison ("SCE"), has made clear that Mohave's continued operation is dependent on a reliable and affordable coal supply from Peabody, which in turn is dependent on the validity of Peabody's leases. SCE has indicated that the Mohave plant may close after the current coal supply agreement expires in 2005. Yet Mohave provides employment and electricity for many communities, including the Navajo Nation, and its closure would inflict irreparable injury upon Peabody, its employees, and consumers throughout the Southwest. Indeed, in the words of the Hopi Tribe, the shutdown of Mohave would be "a modern economic massacre of the Hopi Tribe and its people."[4]

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[4] Proposed Decision, Opinion Authorizing SCE To Make Necessary and Appropriate Expenditures On Critical Path Investments At Mohave While Continuing To Seek Resolution of the Water and Coal Issues and To Establish a MERMA Account, Application 02-05-046, at 27 (Calif. CPUC Oct. 20, 2004) (quoting Hopi brief).

CONCLUSION

The petition for writ of certiorari should be granted. Alternatively, because the Ninth Circuit has interfered with Peabody's ability to enforce this Court's mandate in *Navajo Nation*, summary reversal is warranted.

Respectfully submitted.

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